IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

SUMMONS FOR JUDGMENT NO.147 OF 2007

IN

SUMMARY SUIT NO.2425 OF 2006

Ketan Mahendra Shah. ...Plaintiff.

Versus

M/s. Synchrotech Service Pvt. Ltd. ...Defendant.

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Mr. Bhavin Bhatia i/b.Bipin Joshi for the Plaintiff.
Ms. J.M. Sidhwa i/b.Neela A Mahto for the Defendant.

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CORAM : DR. D.Y. CHANDRACHUD, J.

June 19, 2007.

P.C.:

On the basis of invoices for the period 5th April 2002 till 30th October 2002, the suit was instituted on 3rd August 2006. The suit is prima facie barred by limitation since it was instituted beyond a period of 3 years of the accrual of the right to sue. The institution of a Company Petition for winding up before this Court would not prima facie save the bar of limitation having regard to the provisions of Section 14 of the Limitation Act, 1963. A petition for winding up is not a civil proceeding for the recovery of dues. A Petition for winding up

hence cannot be regarded as dealing with the "same matter in issue" as a suit for recovery of moneys due and outstanding. in the judgment in **Mediqup Systems Pvt. Ltd. vs. Proxima Medical System GMBH**[1] the Supreme Court held as follows :

> "This Court in catena of decisions held that an order under Section 433(e) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression 'unable to pay its dues' in Section 433(e) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilized merely as a means for realising debts due from a company."

Prima facie the defence of limitation raises a triable issue. Unconditional leave is granted to the Defendant to defend the suit.

2. In the Company Petition instituted by the Plaintiff (Company Petition 767 of 2005), the Learned Company Judge of this Court, by an order dated 23rd March 2006 has directed the Defendant herein to deposit an amount of Rs.1 lakh with liberty reserved to the Plaintiff herein to institute a suit on the balance. The amount was directed to be transferred to the credit of the suit. Having

1 AIR 2005 S.C. 4175

regard to the fact that the Defendant has been held to be entitled to unconditional leave to defend the suit, the Defendant would have to be permitted to withdraw the amount of Rs.1 lakh deposited in pursuance of the order dated 23rd March 2006 together with interest, if any, accrued thereon. There shall an order accordingly.

3. The Summons for Judgment is accordingly disposed of. Written Statement to be filed within six weeks from today.

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